In the Supreme Court

OF THE

United States

OCTOBER TERM, 1945

No. 1200

WALTER S. HELLER,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

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PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Walter S. Heller, prays that a writ of certiorari be issued to review that portion of the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered January 27, 1945, adverse to petitioner.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 165) is not reported.

The opinion of the Tax Court of the United States (R. 33-58) is reported in 2 T. C. 371.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on January 27, 1945 (R. 171). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. Code, Sec. 347).

QUESTION PRESENTED.

Where the facts relating to a reorganization are not in dispute and the Tax Court has found that no gain or loss may be recognized under Section 112(b) (3) of the Revenue Act of 1936, is the finding of the Tax Court a finding of fact not subject to review by the Circuit Court of Appeals under the rule of *Dobson v. Commissioner of Internal Revenue*, 320 U. S. 489, or is such finding a conclusion of law subject to review by the Circuit Court of Appeals?

STATEMENT.

There was no dispute as to the facts in the Tax Court; they show that:

During the years 1923 to 1927 petitioner and Harry A. Bruce were members of a partnership engaged in the investment banking business in San Francisco, California, under the name of Heller, Bruce & Co. Edith C. French was an employee of the partnership.

On January 1, 1927, Heller, Bruce & Co. was incorporated under the laws of the State of Delaware (this corporation will be hereinafter referred to as the Delaware corporation) (R. 129). The Delaware corporation issued its stock in exchange for the assets of the partnership. Under the applicable Revenue Act, no gain or loss was recognized on the exchange (R. 130). From January 1, 1927, until the issuance of a certificate of dissolution by the Secretary of State of Delaware on December 20, 1937, the Delaware corporation engaged in the investment banking business in San Francisco. Harry A. Bruce, Edith C. French, and the petitioner were at all times the stockholders, officers, and directors of the Delaware corporation (R. 130, 131).

In 1937 petitioner decided to change the state of incorporation of Heller, Bruce & Co., from the State of Delaware to the State of California for certain business purposes (R. 109-110). In order to accomplish this change, the following steps were taken:

On December 6, 1937, Heller, Bruce and Co. was organized under the laws of the State of California (this corporation will be hereafter referred to as the California corporation) (R. 132). On December 15, 1937, the California corporation issued and sold to

petitioner 1500 shares of its common stock and 2000 shares of its preferred stock for cash (R. 133).

On December 15, 1937, the directors of the California corporation adopted a resolution authorizing the purchase of the assets of the Delaware corporation at book value, less liabilities, for cash. On the same date, a meeting of the Board of Directors of the Delaware corporation was held accepting the offer of the California corporation to purchase the assets of the Delaware corporation. On the same date, all of the stockholders of the Delaware corporation signed a consent to its dissolution.

On December 20, 1937, the Delaware corporation was dissolved and the purchase price of the assets received by the Delaware corporation from the California corporation was distributed to the stockholders of the Delaware corporation in proportion to the stock held by them (R. 135, 136).

On January 20, 1938, 45 shares of the common stock and 60 shares of the preferred stock held by petitioner were transferred by petitioner to Harry A. Bruce and one share of the preferred stock was transferred to Edith C. French (R. 133).

The Tax Court held that petitioner did not sustain a deductible loss in 1937 by reason of the series of steps above set forth, that they were part of one transaction, the substance of which was an exchange of stock in the Delaware Corporation for stock in the California corporation pursuant to a plan of reorganization, and that no gain or loss is recognizable be-

cause of the provisions of Section 112(b) (3) of the Revenue Act of 1936 (R. 57).

The Circuit Court of Appeals for the Ninth Circuit did not determine the question of law presented as to whether, on the stipulated facts, the plan of reorganization was a tax-free reorganization but held that, in line with the principle of the case of *Dobson v. Commissioner,* 320 U. S. 489, there was "warrant in the record" to support the finding of the Tax Court and, therefore, affirmed the judgment of the Tax Court on this point.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals erred

1. In holding, on the authority of *Dobson v. Commissioner of Internal Revenue,* 320 U. S. 489, that the decision of the Tax Court on the question as to whether or not the reorganization was a tax-free reorganization within the provisions of Section 112(b) (3) of the Revenue Act of 1936 was a question of fact not subject to review by the Circuit Court of Appeals;

2. In affirming the judgment of the Tax Court on this point.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

The decision in this case is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *Thornley v. Commis-*

sioner, decided January 15, 1945, page 10,724, CCH, paragraph 9139, on an important question relating to the interpretation of Federal income tax statutes. In the case of *Thornley v. Commissioner,* petitioner held a ten per cent interest as a member of a copartnership. On May 1, 1929, the business and assets of the partnership were transferred to a corporation pursuant to an agreement between the partners and the newly formed corporation, and the corporate shares were issued to the partners in proportion to their respective partnership interests. On January 4, 1937, petitioner sold his stock in the corporation. It was agreed that under the provisions of the Revenue Act of 1928 no gain or loss was recognized from the exchange on May 1, 1929, and that the corporate stock received from the exchange had the same base as the partnership interests. The question presented was whether the taxpayer's stock was received in exchange for his partnership interest or for the assets of the partnership and whether taxpayer was entitled under Section 117(c) (1) of the Revenue Act of 1936 to tack onto the period during which he held the stock the additional period during which he held the partnership interest exchanged for stock. The Tax Court held that the taxpayer was entitled to tack onto the holding period of the stock only the period during which he held an interest in the specific assets of the partnership. The Circuit Court of Appeals for the Third Circuit held that the ultimate finding of the Tax Court was a conclusion of law, or at least a determination of a mixed question of law and fact, that it was to be distinguished from the findings of pri-

mary, evidentiary, or circumstantial facts and was subject to judicial review, that the rule in the *Dobson* case did not apply, and that the ultimate finding of the Tax Court was subject to review by the Circuit Court of Appeals.

It is respectfully submitted that the conclusion of the Circuit Court of Appeals for the Ninth Circuit in this case to the effect that the finding of the Tax Court that there was a tax-free reorganization was a finding of fact not reviewable under the *Dobson* case is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Thornley v. Commissioner,* supra, which held that a similar finding made by the Tax Court was a conclusion of law subject to review by the Circuit Court.

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
April 16, 1945.

SIDNEY M. EHRMAN,
Counsel for Petitioner.

SAMUEL S. STEVENS,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1200

WALTER S. HELLER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 34–58) are reported at 2 T. C. 371. The opinion of the circuit court of appeals (R. 165–170) is reported at 147 F. 2d 376.

JURISDICTION

The judgment of the circuit court of appeals was entered on January 27, 1945 (R. 171). The petition for a writ of certiorari was filed on April 25, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below erred in affirming the Tax Court, which held that a series of transactions resulting in the transfer of the business and assets of a Delaware corporation to a California corporation amounted to a tax-free reorganization within the meaning of Section 112 (b) (3) and (g) (1) of the Revenue Act of 1936, so that no loss shall be recognized.

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 112. RECOGNITION OF GAIN OR LOSS.
>
> * * * * *
>
> (b) *Exchanges Solely in Kind.*—
>
> * * * * *
>
> (3) *Stock for stock on reorganization.*—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.
>
> * * * * *
>
> (g) *Definition of Reorganization.*—As used in this section and section 113—
>
> (1) [as amended by Section 213 (g) of the Revenue Act of 1939, c. 247, 53 Stat. 862] The term "reorganization" means (A) a statutory merger or consolidation, or (B) the acquisition by one corporation, in exchange solely for all or a part of its voting

stock, of substantially all the properties of another corporation, but in determining whether the exchange is solely for voting stock the assumption by the acquiring corporation of a liability of the other, or the fact that property acquired is subject to a liability, shall be disregarded; or the acquisition by one corporation in exchange solely for all or a part of its voting stock of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of another corporation, or (C) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its shareholders or both are in control of the corporation to which the assets are transferred, or (D) a recapitalization, or (E) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of a reorganization resulting from the acquisition by one corporation of stock or properties of another.

* * * * *

STATEMENT

To the extent relevant to the issue raised by the taxpayer's petition, the facts as stipulated (R. 89–90, 91, 108–109, 125–142) and as found by the Tax Court (R. 39–51) may be summarized as follows:

On January 1, 1927, Heller, Bruce & Company was incorporated under Delaware law, as successor to a partnership previously conducted in California under the same name. At all times, the principal officers of the corporation were Walter S. Heller (petitioner herein), president, Harry A. Bruce, vice president, and Edith C. French, secretary and treasurer. These three individuals were also the directors and sole stockholders. (R. 39–41.)

On December 6, 1937, Heller, Bruce and Company was organized under the laws of California. The name of the corporation was changed on December 28, 1937, to Heller, Bruce & Company. At the first meeting of the board of directors of the California corporation held on December 7, 1937, the president announced that the California corporation had been organized for the purpose of acquiring and carrying on the business of the Delaware corporation. (R. 41.)

On December 15, 1937, the petitioner borrowed from the Wells Fargo Bank & Union Trust Company the sum of $200,000, executing promissory notes therefor and depositing securities as collateral. On the same day he drew checks totaling $195,355, payable to the order of the California corporation, Edith C. French drew a check for $100, and Harry A. Bruce drew a check for $6,045. All of the checks, aggregating $201,500, were deposited on December 15, 1937, in an account to the credit of the California corporation in the Wells Fargo

Bank & Union Trust Company. (R. 43–44.) The checks were received by the California corporation in payment of its stock, as follows (R. 43):

Stockholders	Preferred		Common	
	Shares	Percent	Shares	Percent
Walter S. Heller	1,939	96.95	1,455	97
Harry A. Bruce	60	3.00	45	3
E. C. French	1	.05	None	None
Total	2,000	100	1,500	100

However, the corporation issued 1,500 shares of its common stock and 2,000 shares of its preferred stock to the petitioner on December 15, 1937, and the corporation did not issue its stock in the above amounts and proportions until January 20, 1938, when the petitioner surrendered his stock certificates and others were issued by the corporation. (R. 42–43.)

On December 15, 1937, the directors of the California corporation adopted a resolution authorizing the purchase of the assets of the Delaware corporation at book value, less liabilities, for the total sum of $681,741.41 (R. 44). On the same day, the directors of the Delaware corporation resolved to sell its assets to the California corporation for the price stated and also resolved to liquidate and wind up the affairs of the Delaware corporation and transfer its assets to the stockholders (R. 45).

On December 15, 1937, the Delaware corporation was indebted to Wells Fargo Bank & Union

Trust Company in the amount of $565,000 on demand notes secured by collateral. On December 16, 1937, the California corporation borrowed $565,000 on a note from Wells Fargo Bank & Union Trust Company which was credited to an account in the name of the California corporation. (R. 45.) On the same day the California corporation issued its check in the amount of $681,741.41 to the Delaware corporation for the assets of the Delaware corporation, and the Delaware corporation issued its check to Wells Fargo Bank & Union Trust Company in complete liquidation of its debt of $565,000. The bank retained the collateral for the discharged Delaware corporation loan as collateral for the California corporation's loan in the same amount. (R. 45–46.)

On December 17, 1937, the Delaware corporation issued its check to the petitioner in the sum of $135,000. This check was endorsed by the petitioner and delivered to Wells Fargo Bank & Union Trust Company in partial payment upon his loan account. (R. 49.)

A certificate of dissolution of the Delaware corporation was issued on December 20, 1937 (R. 49).

On December 24, 1937, the California corporation issued its check to the Delaware corporation in the amount of $23,939.49 for certain remaining assets (R. 49). On the same day the Delaware corporation issued checks to its stockholders as follows (R. 50):

Walter S. Heller	$21,463.66
Harry A. Bruce	6,280.22
E. C. French	62.90

The petitioner endorsed the check issued to him and delivered it to Wells Fargo Bank & Union Trust Company in payment of his loan account (R. 50).

The first directors of the California corporation were dummy directors. After the initial stage the directors and officers of the California corporation were the same persons who had been officers and directors of the Delaware corporation. The business policies of the California corporation were the same as those of the Delaware corporation and the customers of the former were substantially the same as the latter. (R. 51.)

In his income tax return for 1937, the petitioner claimed capital loss deductions totaling $51,488.05, in connection with his disposition during December 1937 of 2,649 shares of the preferred stock of the Delaware corporation (R. 51). The Tax Court held that no gain or loss could be recognized because it resulted from a tax-free reorganization (R. 57), and the circuit court of appeals affirmed (R. 170).

ARGUMENT

Section 112 (b) (3) of the Revenue Act of 1936, *supra*, provides that no gain or loss shall be recognized if stock in a corporation a party to a reorganization is, in pursuance of the plan of reorganization, exchanged solely for stock in another corporation a party to the reorganization.

That is exactly what occurred in this case. The Tax Court treated the series of steps as one transaction and, after reviewing the facts, concluded that (R. 57)—

> The effect of all the steps taken was that petitioner made an exchange of stock of one corporation for stock of another pursuant to a plan of reorganization.

The disposition of the case under the applicable statute is controlled by the ultimate finding quoted above. That finding is of a type stated by this Court to be exclusively within the province of the Tax Court because it turned on the Tax Court's treatment of the several steps as one whole transaction. *Dobson* v. *Commissioner,* 320 U. S. 489, 502, rehearing denied, 321 U. S. 231. There was no question of law for the circuit court of appeals to consider on review and that court did not err in concluding (R. 170) that the Tax Court's finding of fact had warrant in the record.[1] *Commissioner* v. *Court Holding Co.,* No. 581, this Term, decided March 12, 1945; *Commissioner* v. *Scottish American Co.,* 323 U. S. 119; *Commissioner* v. *Wemyss,* No. 629, this Term, decided March 5, 1945; *Choate* v. *Commissioner,* No. 93, this Term, decided January 29, 1945; *Commissioner* v. *Heininger,* 320 U. S. 467; *Dobson* v. *Commissioner, supra.*

[1] The question of the deductibility of certain expenditures was presented to the court below by the Commissioner's cross-appeal, but it is not before this Court.

The petition (pp. 5–7) asserts a conflict between the decision below and *Thornley* v. *Commissioner*, 147 F. 2d 416 (C. C. A. 3). The question in the *Thornley* case was whether the taxpayer's holding period for certain stock was eight or ten years, for the purpose of applying the percentage recognition provisions of Section 117 of the Revenue Act of 1936. The issues in the two cases are not even remotely similar. The fact that the majority of the reviewing court in the *Thornley* case did not feel bound to affirm the decision of the Tax Court [2] does not create a conflict with the present case.

CONCLUSION

The decision below is correct and does not present a conflict. There is no question involved which warrants consideration by this Court. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1945

[2] See, however, the dissenting opinion of Judge Goodrich in the *Thornley* case (p. 423).

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